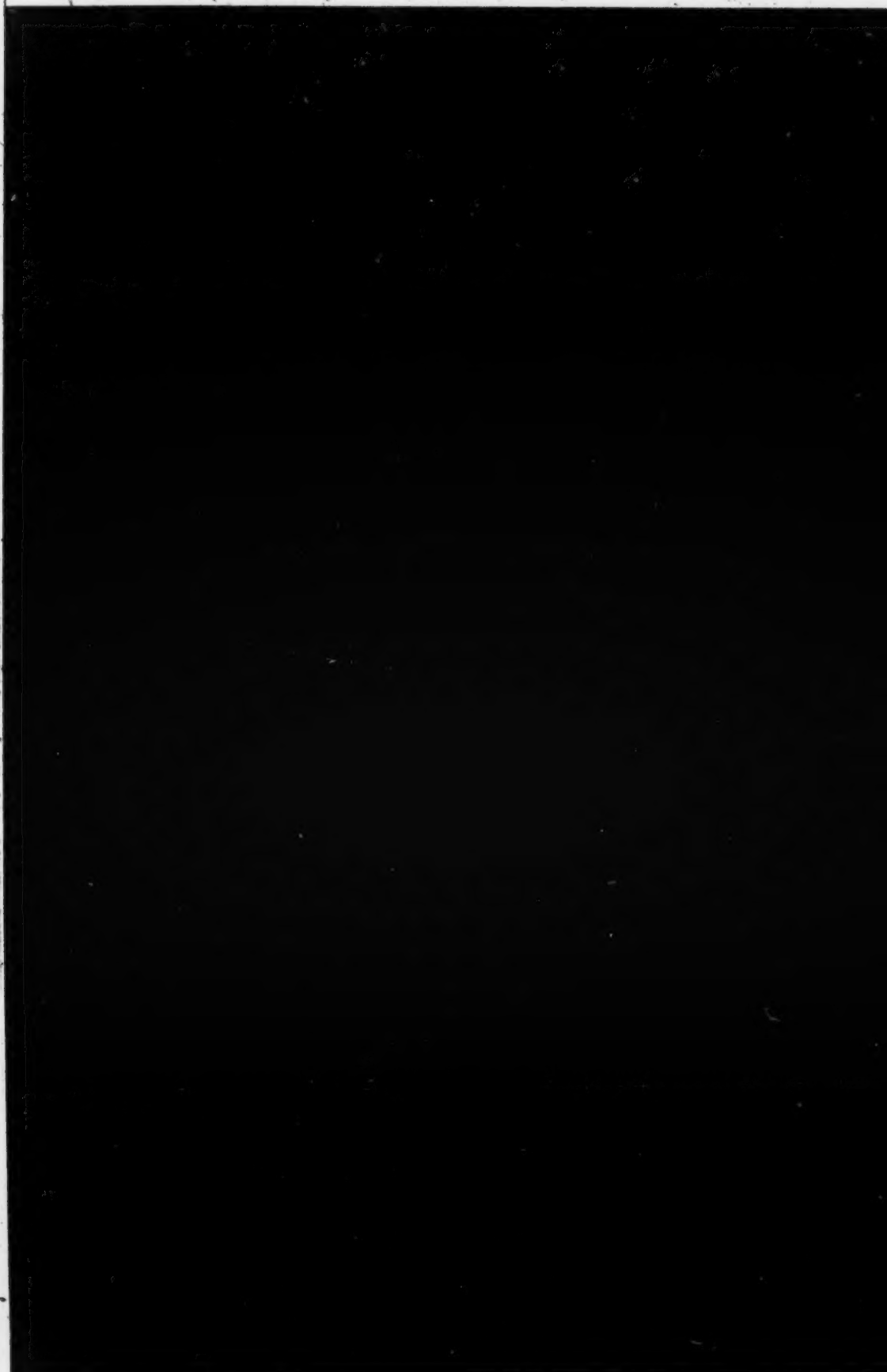

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IN THE

Supreme Court of the United States

OCTOBER TERM 1965

No. 1329

SANFORD E. ADAY, WALLACE DE ORTEGA MAXEY, and WEST COAST NEWS COMPANY, INC.,
Petitioners,
v.
UNITED STATES OF AMERICA,
Respondents.

BRIEF OF AMERICAN AND MICHIGAN CIVIL LIBERTIES UNIONS AS AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The filing of this brief *amici curiae* has been consented to by the Solicitor General.

INTEREST OF AMICI

The American Civil Liberties Union and its Michigan affiliate are dedicated to preserving and strengthening individual rights. We regard the broadest freedom of expression as indispensable to political debate, social commentary and artistic development as well as the basic values of a democracy. We filed a brief *amici curiae* in the court below supporting reversal of appellants' convictions because, while "Sex Life of a Cop" may not qualify as enduring literature, we firmly believe it is "speech" and entitled to the protection of the First Amendment. We file the present brief because we believe the case presents important First Amendment questions which this Court should answer.

ADDITIONAL REASONS FOR GRANTING THE WRIT

We urge the reasons advanced in the petition for certiorari and, in addition, the following:

1. THE COURT SHOULD GRANT CERTIORARI IN THIS CASE TO CONSIDER AND DECIDE WHETHER TO CONTINUE ITS PRESENT OBSCENITY PER SE APPROACH TO EXPRESSION DEALING WITH SEX OR CHANGE TO ONE THAT CAN BE APPLIED TO ALL EXPRESSION, REGARDLESS OF SUBJECT MATTER.

While we urge the court to abandon the *Jacobellis*[1] test, we state unhesitatingly that it is an improvement on *Roth*,[2]

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[1] *Jacobellis v. Ohio*, 378 U.S. 184 (1964).

[2] *Roth v. United States*, 354 U.S. 476 (1957).

which was, in turn, an improvement on the earlier test, *Regina v. Hicklin*, [1868] LR 3 Q.B. 360. The merit of *Jacobellis* is that it allows for the preservation of works which, though prurient in appeal and excessive in candor, nevertheless are not utterly without redeeming social importance. *Jacobellis* acknowledges that certain works dealing with sex offend the sensibilities of some and that there is a possibility that they may have some kind of deleterious effect on certain types of personalities. But it asserts that these interests, though they exist, are not weighty enough to justify suppressing a work if it offers society anything at all of importance. In short, *Jacobellis* reaffirms the principle that freedom of expression is one of the most important values in a democracy, and therefore worth taking some risks for.

But regardless of its merit, *Jacobellis* is a *per se* test. It is based on the proposition that obscenity is not "speech," and so asks only—is the work obscene? If it is, it is without the protection of the First Amendment, under *Jacobellis*. In *New York Times v. Sullivan*, 376 U.S. 254, 269 (1964), the Court cast off the *per se* approach to expression dealing with reputation and indicated that it cannot be applied without risk to *any* area of expression:

> "Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, *obscenity* [citing *Roth*], solicitation of legal business, and the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no *talismanic* immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment." (Emphasis added.)

Nevertheless, in *Memoirs of a Woman of Pleasure v. Massachusetts*,[3] *Ginsberg v. United States*,[4] and *Mishkin v. New York*[5] the Court again posed as the determinative question—Is it obscene?

We are opposed to the application of different tests to different expression, depending upon its subject matter, and favor the fashioning of one test that can be applied to all expression regardless of what it is about, i.e., government, race, war, sex, religion, etc. See, e.g., Emerson, *Toward a General Theory of the First Amendment*, 72 Yale L.J. 877 (1963). We urge the Court to grant certiorari in this case so that such a test can be fashioned.

2. EVEN IF THE OBSCENITY PER SE TEST IS TO BE RETAINED, THE COURT SHOULD GRANT CERTIORARI IN THIS CASE BECAUSE IT INVOLVES A BOOK OF THE TYPE THE COURT HAS NOT DEALT WITH AND WHICH PROBABLY CONSTITUTES A MAJORITY OF THOSE CONSIDERED OBJECTIONABLE, I.E., "DIRTY" PAPERBACK NOVELS WHICH ARE NOT, HOWEVER, HARD CORE PORNOGRAPHY.

The Court has dealt with obscene letters,[6] lewd photographs of actresses,[7] a tabloid featuring photographs of women,[8] a newspaper article containing coarse and vulgar language,[9] newspaper advertisements,[10] news magazines

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[3] — U.S. —, 16 L. ed. 2d 1 (1966).

[4] — U.S. —, 16 L. ed. 2d 31 (1966).

[5] — U.S. —, 16 L. ed. 2d 56 (1966).

[6] E. g., *United States v. Chase*, 135 U.S. 255 (1890).

[7] *Grimm v. United States*, 156 U.S. 604 (1895).

[8] *Rosen v. United States*, 161 U.S. 29 (1896).

[9] *Swearingen v. United States*, 161 U.S. 446 (1896).

[10] *Dunlop v. United States*, 165 U.S. 486 (1897).

featuring sex crimes,[11] girly magazines,[12] homosexual magazines,[13] nudist magazines,[14] motion pictures,[15] novels of masochism and sadism,[16] digests of psychiatric studies of sex,[17] a psychosexual biography,[18] essays on love, sex, and sexual relations,[19] and an eighteenth century pornographic novel.[20] It has not, however, dealt with a book like "Sex Life of a Cop."

The book is a paperback novel dealing with two young police officers who become disillusioned with their official duties and fall victims to the many sexual temptations that are tendered them by a broad spectrum of the city's womanhood. While a great volume and variety of sexual activity is described, the language employed is not obscene. All the sexual activity is heterosexual and there is no sadism, masochism, etc. The work is what is commonly called a "dirty book," but not hard core pornography.[21] We submit that it is not obscene under *Jacobellis*.

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[11] *Winters v. New York*, 333 U.S. 507 (1948).

[12] *Hannegan v. Esquire, Inc.*, 327 U.S. 146 (1945).

[13] E. g., *Manual Enterprises v. Day*, 370 U.S. 478 (1962).

[14] E. g., *Sunshine Book Co. v. Summerfield*, 355 U.S. 372 (1958).

[15] E. g., *Burstyn v. Wilson*, 343 U.S. 495 (1952).

[16] *Mishkin v. New York*, — U.S. —, 16 L. ed. 2d 56 (1966).

[17] *Ginsberg v. United States*, — U.S. —, 16 L. ed. 2d 31 (1966) ("Liaison").

[18] Id. ("The Housewife's Handbook").

[19] Id. (EROS).

[20] *Memoirs of a Woman of Pleasure v. Massachusetts*, — U.S. —, 16 L. ed. 2d 1 (1966).

[21] *Jacobellis v. Ohio*, 378 U.S. 184, 197 (Justice Stewart, concurring).

Books of this type can be found on drug store paperback racks in cities, towns, and villages across the country. If we are to continue with the obscenity *per se* approach—or, indeed, regardless of what approach is used—the question of whether or not such books are protected as "speech" should be decided.

CONCLUSION

For the foregoing reasons, as well as those advanced by petitioner, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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